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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 50

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAGTAB PUBLICATIONS CORP., SKYE PUBLISHING CO. INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC. and VOLITANT PUBLISHING CORP.,

Appellants,

against

THE STATE OF ARKANSAS,

Appellee.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS AMICUS CURIAE

HORACE S. MANGES,
Attorney for American Book Publishers Council, Inc.,
60 East 42nd Street,
New York, New York 10017.

HORACE S. MANGES,
MARSHALL C. BERGER,
ARTHUR F. ABELMAN,
WEIL, GOTSHAL & MANGES,
Of Counsel.

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Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc., of 1 Park Avenue, New York City, is a membership corporation composed of most of the leading publishers of books of general circulation, including many university presses. It is estimated that the 188 members of the Council publish and distribute over 85% of all general books in the United States. None of the appellants is a member of the Council.

The Council is deeply interested in safeguarding freedom of the press as guaranteed by the First and Fourteenth Amendments to the Federal Constitution. It sought leave to and did obtain consent of the parties to file this brief, because it believes that Act 261 of the Acts of Arkansas 1961 is unconstitutional. The Council, as a matter of policy, takes no position with respect to the obscenity *vel non* of any publication and, therefore, this brief will not address itself to the character of the magazines herein involved.

ARGUMENT

POINT I

The statute is invalid in that on its face it is unconstitutionally vague and uncertain.

The statute attempts to regulate obscenity and contains a definition of the term "Obscene" as follows: "'Obscene' means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (§ 41-2715 (2)). That was this Court's definition in 1957 when it decided *Roth* v. *United States,* 354 U. S. 476, but as Mr. Justice Brennan stated in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 16 L. ed 2d 1 (1966), at pp. 4-5, that definition was "elaborated in subsequent cases" so as to include three elements, of which the abovementioned "prurient interest" test is only one; the remaining ones being, of course, the "patent offensiveness" and the "redeeming social value" tests.

Had the statute merely prohibited the distribution and sale of "obscene" material without attempting to define that term, the courts would have been free to apply the

three required Federal constitutional criteria and the statute would not have been invalid for this reason. *Roth* v. *United States,* at p. 491. However, the statute becomes unconstitutionally vague when it attempts to define obscenity and includes only one criterion of the now three-fold Federal standard, but fails to include the other two requirements thereof. In *Memoirs* v. *Massachusetts, supra,* the opinion of Mr. Justice Brennan, joined in by the Chief Justice and Mr. Justice Fortas, stated:

> "A book can not be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness" (p. 6).

This position with regard to the required presence of patent offensiveness and total absence of redeeming social value of a work has been consistently advanced by various members of this Court since the *Roth* case, *supra.* We believe it is now the opinion of the majority of the present Court as expressed through opinions of the Court or in separate opinions.

Most recently, in the case of *Aday et al.* v. *United States of America* (October Term 1966, No. 149) another obscenity prosecution now pending before this Court, the Solicitor General of the United States filed a brief with this Court requesting a remand of the case because the Trial Court had refused to instruct the jury as to the necessity of total lack of any redeeming social value in

accordance with the decision of this Court in *Memoirs* v. *Massachusetts, supra.*

If the criteria applied by this Court may be whittled away statutorily by each state legislature, this Court's protection of constitutional rights could be readily destroyed. The next step might be for some other state legislature to enact an obscenity statute deleting the prurient interest test.

By reason of the failure of the Arkansas statute to set forth the requirements that a work must be patently offensive and utterly without redeeming social value in order to be adjudicated obscene, an ambiguity is created which cannot be cured. One is unable to determine whether the Arkansas legislature attempted to define "obscene" contrary to the requirements stated by this Court or whether the Federal criteria shall apply in direct contravention of the statute. We submit that such a statute is unconstitutional on its face.

POINT II

The Arkansas statute is unconstitutionally vague in describing the situs of the conduct proscribed.

Section 41-2714 states that it is the purpose and intent of the statute "to reach nonresidents responsible for the composition, publication and distribution of obscene publications within the State," but the succeeding sections appear to pertain only to acts committed within Arkansas. The acts of composition and publication of appellants' magazines, and indeed of most of the publishing community, invariably occur outside Arkansas and this is recognized in the statute by the above statement as to purpose and intent. The authority to control with criminal sanctions activities protected by the First

Amendment must be stated with appropriate definiteness and provide ascertainable standards of guilt. *Winters* v. *New York,* 333 U. S. 507 (1948); *Hallmark Productions, Inc.* v. *Carroll,* 384 Pa. 348 (1956). Because the statute herein fails definitely and clearly to distinguish between acts committed within and outside of Arkansas, it is unconstitutionally vague.

Moreover, the attempt to control composition and publication occurring outside Arkansas will operate to suppress magazines and other publications in states in which such magazines may be lawful. *People* v. *Richmond County News, Inc.,* 9 N. Y. 2d 578 (1961); *State* v. *Hudson County News Co.,* 41 N. J. 247 (1964). It also compounds the confusion created by the differing provisions of Section 41-2714 and the succeeding sections.

Furthermore, the very existence of this purpose and intent clause is a sharp warning to publishers in the other forty-nine states that unless they are willing and able to keep their books out of Arkansas they must publish all their books so as to meet the Arkansas test of obscenity, which ignores patent offensiveness and redeeming social value as criteria. The Arkansas purpose and intent clause is thus a menacing restriction to the dissemination of all literature, including constitutionally protected material, and should not be countenanced by this Court. *Smith* v. *California,* 361 U. S. 147 (1959); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963). The doctrine of *Butler* v. *Michigan,* 352 U. S. 380 (1957) would also be relevant to the validity of this clause because unless it is held invalid other legislatures will be encouraged to raise their own restrictions against constitutionally protected material. The result would be a legal climate in which only bland material satisfactory under all restrictions imposed by all states could be published.

Amicus also calls attention to the general lack of authority of the courts of Arkansas over this type of activity of nonresidents and urges this Court to avoid confusing restrictions on the free flow of ideas. Whatever right the State of Arkansas has to subject out-of-state persons to *civil* actions in the Arkansas courts based upon their sale of merchandise which eventually lands in Arkansas, it cannot impose *criminal* sanctions and confer upon itself *criminal* jurisdiction with respect to persons engaged in activities protected by the First Amendment where those persons have no direct relationship with Arkansas. In contrast to civil jurisdiction statutes, a criminal statute, enforced by extradition, would impose Arkansas standards on out-of-state persons in their activities which enjoy First Amendment protection.

CONCLUSION

For the reasons above stated we urge this Court to hold Act 261 of the Acts of Arkansas 1961 unconstitutional.

Respectfully submitted,

HORACE S. MANGES,
Attorney for American Book Publishers Council, Inc.
60 East 42nd Street,
New York, New York 10017.

HORACE S. MANGES,
MARSHALL C. BERGER,
ARTHUR F. ABELMAN,
WEIL, GOTSHAL & MANGES,
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